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Case No. 82-5466

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

EDWARD G. WELSH,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

STEPHEN W. KLEINMAIER
Assistant Attorney General of Wisconsin

Attorneys for Respondent.

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-1677

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BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in the Brief of Petitioner, the following provisions are cited in the Brief of Respondent:

United States Constitution:

> Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 939.12, Wis. Stats. (1975):

> **Crime defined.** A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

Section 968.07, Wis. Stats. (1975):

Arrest by a law enforcement officer. (1) A law enforcement officer may arrest a person when:

(a) He has a warrant commanding that such person be arrested; or

(b) He believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or

(c) He believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

(d) There are reasonable grounds to believe that the person is committing or has committed a crime.

(2) A law enforcement officer making a lawful arrest may command the aid of any person, and such person shall have the same power as that of the law enforcement officer.

Section 346.65(2), Wis. Stats. (1981):

Penalty for violating sections 346.62 to 346.64.

....

(2) Any person violating s. 346.63(1):

(a) Shall forfeit not less than $150 nor more than $300, except as provided in par. (b) or (c).

(b) Shall be fined not less than $300 nor more than $1,000 and imprisoned not less than 5 days nor more than 6 months if the total of revocations under s. 343.305 and convictions

under s. 346.63 (1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, equals 2 in a 5-year period, except that revocations or convictions arising out of the same incident or occurrence shall be counted as one. The 5-year period shall be measured from the dates of the refusals or violations which resulted in the revocation or convictions.

(c) Shall be fined not less than $600 nor more than $2,000 and imprisoned for not less than 30 days nor more than one year in the county jail if the total of revocations under s. 343.305 and convictions under s. 346.63 (1) or a local ordinance in conformity therewith, or s. 346.63(2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, equals 3 or more in a 5-year period, except that revocations or convictions arising out of the same incident or occurrence shall be counted as one. The 5-year period shall be measured from the dates of the refusals or violations which resulted in the revocation or convictions.

Section 940.19(1), Wis. Stats. (1981):

Battery; aggravated battery. (1) Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

Section 939.60, Wis. Stats. (1981):

Felony and misdemeanor defined. A crime punishable by imprisonment in the Wisconsin state prisons is a felony. Every other crime is a misdemeanor.

SUPPLEMENTAL STATEMENT OF FACTS

The respondent, State of Wisconsin (hereinafter "the state"), provides the following facts to supplement those stated in the Brief of Petitioner and to correct a statement in regard to the facts made in the *amicus curiae* brief filed for the Wisconsin Civil Liberties Union Foundation.

Randy Jablonic saw Edward G. Welsh (hereinafter "the defendant") driving his car extremely cautiously, first traveling very, very slowly and then a little faster (R. 13:8).[1]/ Jablonic saw the car go from side to side on the road; and as the car approached a boulevard it headed for the median where there was a sign telling drivers to stay to the right (R. 13:8-9). Jablonic said the car was not traveling at an excessive rate of speed, but it was weaving back and forth (R. 13:9). Jablonic saw the defendant's eastbound car go down the left lane (R. 13:9). When a car approached from the east, the defendant's car veered left at the last moment before a head-on collision occurred and drove into a cemetery, or open field, where the car stalled or got stuck. (R. 13:9).

Jablonic drove past the defendant's car, turned around and pulled up behind the car to keep it from returning to the road (R. 13:10). Jablonic explained:

> I made a u-turn there and pulled up behind because I didn't want that car to come back out on the road. Because I realized they would probably kill somebody. And I immediately stopped the lady or the person who had been forced to stop by this car, and asked them to go call the police — to get some help so that we

[1]/ The record reference is to page 8 in the transcript of the hearing of July 14, 1980, which has been numbered document 13 in the record. Later in this brief there is a reference to a transcript of another portion of the July 14, 1980, hearing and that transcript is numbered document 14 in the record.

> could prevent this person from getting back out on the road.

(R. 13:10)

As reported in the Brief of Petitioner, while Jablonic was stopped the defendant approached Jablonic's truck. The defendant asked Jablonic for a ride home and Jablonic said that they had better wait to get some help to get the car out (R. 13:12). Jablonic testified:

> And then the person broke into a very slurred conversation — "you wouldn't get your cops" —or something — it was very insecure and not very controlled conversation. I was very — they were very much concerned that I would call the cops, and they were accusing that I was going to call the cops. I said, "Well, I have sent the lady to get help."

(R. 13:12)

Jablonic said that the defendant again asked for a ride home, and when Jablonic refused the defendant walked away (R. 13:12).

At page 27 of the *amicus curiae* brief filed for the Wisconsin Civil Liberties Union Foundation there is a statement that the police "barged right in" the Welsh home. There is nothing in the record to support the claim that the police barged into the Welsh home. As indicated at pages 10 and 11 of the Brief of Petitioner, the police thought they had received consent to enter the home but Mrs. Welsh denied that she had given consent. The judge made no findings on whether the entry was consensual; but not even Mrs. Welsh's testimony supports a claim that the police "barged right in" the home.

SUMMARY OF ARGUMENT

The police made a warrantless arrest of the defendant in his home for the offense of operating a motor vehicle while under the influence of an intoxicant. The defendant was charged with the misdemeanor offense of operating while under the influence (R. 3:1; J.A. 4-5).

The state understands the defendant's argument to be that his arrest was invalid for two reasons: first, he was arrested for a forfeiture offense and the police can never make a warrantless arrest of an accused in his home for a forfeiture offense; and, second, even if a warrantless arrest in the home could be made on the basis of probable cause and exigent circumstances, no exigent circumstances existed in this case.

In responding to the defendant's arguments, the state contends, first, that this case should be treated as an arrest for a misdemeanor rather than for a forfeiture offense since under the state law the defendant had to be charged with the misdemeanor offense because he had a prior conviction for drunk driving.[2]/ Second, whether the arrest was for an offense labeled either a forfeiture or a misdemeanor by the Wisconsin Legislature, the police had the authority to make the warrantless entry and the arrest was constitutionally valid as long as the police possessed probable cause and there were exigent circumstances justifying their failure to obtain a warrant. This is the same test applied by this Court in *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), and *Payton v. New York*, 445 U.S. 573, 590, 603 (1980). Third, the probable cause prong has been satisfied in this case and the defendant has not challenged the fact that the police possessed probable cause. Fourth, exigent circumstances

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[2]/ Whether the difference between an arrest for a forfeiture offense and an arrest for a misdemeanor offense is significant will depend upon how this Court decides the question of the police officer's authority to arrest, a question the state discusses in section II of this brief.

existed, *i.e.*, the police needed to make an immediate arrest in order to prevent the imminent destruction of evidence because if time had been taken to obtain a warrant the alcohol level in the defendant's blood would have diminished before tests could be made.

On the basis of these arguments, the state concludes that, because the police possessed probable cause and exigent circumstances existed, the warrantless arrest of the defendant in his home was constitutionally valid.

ARGUMENT

I. The Defendant Was Arrested For The Misdemeanor Offense Of Operating A Motor Vehicle While Under The Influence Of An Intoxicant.

The defendant was arrested in his home on April 24, 1978, for operating a motor vehicle while under the influence of an intoxicant (R. 13:27, 38; J.A. 29, 46).

In April, 1978, a person convicted of drunk driving for the first time could be required to forfeit not more than $200. Sec. 346.65(2), Wis. Stats. (1975). For each subsequent conviction for violating the drunk driving statute within five years, the person "shall be imprisoned not less than five days nor more than one year and in addition may be fined not more than $500." Sec. 346.65(2), Wis. Stats. (1975). Thus, under Wisconsin's definition of a crime, conviction for the first offense of drunk driving was not criminal since it was punishable only by a forfeiture; but each subsequent conviction within five years was a crime because it was punishable by a fine or imprisonment or both. *See* sec. 939.12, Wis. Stats. (1975) (crime is an offense punishable by fine, imprisonment or both).

The defendant has contended that he was arrested for the first offense of drunk driving, *i.e.*, a forfeiture offense, because there was no evidence that at the time of the arrest the police knew that within the previous five years he had been convicted of drunk driving.

The defendant has stated that the question presented in this case is whether the police can, without a warrant and without consent, enter a suspect's home at night to arrest him for a nonjailable traffic offense committed outside the presence of the police (Brief of Petitioner at 2-3).

The state submits that the defendant is incorrect in concluding that the arrest was made for a nonjailable traffic offense. The state contends that, for the following reasons, the arrest was made for a misdemeanor offense for which the defendant, if convicted, would be required to spend a minimum of five days in jail and for which he could be sentenced to spend up to one year in jail.

The defendant was charged with the misdemeanor offense of drunk driving (R. 3:1; J.A. 4-5), thereby indicating that he had a prior conviction within five years. Because the defendant had the prior conviction, he had to be charged with the misdemeanor offense of drunk driving; the prosecutor and the trial court had no choice. In *State v. Banks*, 105 Wis. 2d 32, 39, 40, 313 N.W.2d 67, 70 (1981), the Wisconsin Supreme Court considered a later version of sec. 346.65, Wis. Stats., which states the penalty for drunk driving; and the court concluded that, because the statute used the word "shall" in regard to the punishment for subsequent offenses, the legislature intended that criminal proceedings and penalties are required for a second offense drunk driving charge within a given five-year period. Under the rationale of *Banks*, the use of the word shall in sec. 346.65(2), Wis. Stats. (1975), which was in effect on the date of the defendant's arrest, required that the defendant be charged

with the criminal offense of drunk driving because he had a prior conviction within five years.

In *Banks*, the Wisconsin Supreme Court pointed out that the trial court had no discretion to treat the second offense as anything but a misdemeanor. 105 Wis. 2d at 42, 43, 313 N.W.2d at 71, 72. In *County of Walworth v. Rohner*, 108 Wis. 2d 713, 717, 324 N.W.2d 682, 684 (1982), the Wisconsin Supreme Court said that even though the first drunk driving offense may be charged civilly, "'subsequent offenses *must be charged as crimes.*'" (Emphasis added in *Rohner*.) The court considered a version of sec. 346.65, Wis. Stats., that differed from the 1975 version applicable to the defendant; but because the court's conclusion was based on the legislature's use of the word "shall" (*Rohner*, 108 Wis. 2d at 717, 324 N.W.2d at 683), the court's reasoning and conclusion apply to the 1975 statute that also used the word shall to require imprisonment for the second or subsequent offenses within five years. This means that, because the defendant in the instant case had a prior drunk driving conviction, he had to be charged with the misdemeanor offense of drunk driving. When the police officers arrested the defendant for drunk driving, the arrest was for the misdemeanor offense of drunk driving whether or not the police knew of the prior conviction.

The police had probable cause to arrest the defendant for the misdemeanor offense of drunk driving even if they did not know of the prior conviction. The two elements of the offense of operating while under the influence of an intoxicant are (1) driving or operating a motor vehicle and (2) doing so while under the influence of an intoxicant. *State v. McAllister*, 107 Wis. 2d 532, 535, 319 N.W.2d 865, 867 (1982), and *State v. Burkman*, 96 Wis. 2d 630, 644, 292 N.W.2d 641, 647-48 (1980). Those two elements constitute the conduct prohibited by the drunk driving statute, which was sec. 346.63(1), Wis. Stats. (1975). Those are the only facts the police must know about the

accused in order to have probable cause to believe that the accused violated the drunk driving statute.

The penalty for violating sec. 346.63(1), Wis. Stats. (1975), was specified in a different statute, sec. 346.65, Wis. Stats. (1975), which provided that the first offense carried a forfeiture penalty and that subsequent offenses within five years must be penalized by imprisonment and possibly a fine. The graduated penalty structure in sec. 346.65, Wis. Stats., "is nothing more than a penalty enhancer similar to the repeater statute which does not in any way alter the nature of the substantive offense, *i.e.*, the prohibited conduct, but rather goes only to the question of punishment." *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

Therefore, when the police had probable cause to believe that the defendant had operated a motor vehicle while under the influence of an intoxicant, the police had probable cause to believe that the defendant had committed a crime in violation of sec. 346.63(1), Wis. Stats. (1975). Because the defendant had the prior conviction his conduct constituted the crime whether or not the police knew of the prior conviction.

The instant case is similar to *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). In that case, the officers thought they had a valid warrant to arrest the accused for a misdemeanor. The court held the warrant invalid but ruled that the arrest was still valid simply because the facts known by the police constituted probable cause to believe that the accused had committed a felony. Thus, in *LaBelle*, the arrest was valid because the facts known by the police constituted a felony. It made no difference to the validity of the arrest that the police did not realize they had knowledge of a felony; in fact, they believed the arrest was for a misdemeanor.

In the instant case, then, the defendant was arrested for the misdemeanor offense of drunk driving. Whether the police knew of the defendant's prior conviction is irrelevant to the question of the validity of the arrest. As the state will argue in the next section of this brief, the arrest was valid whether the defendant was arrested for a forfeiture offense or for a misdemeanor. But if it makes a difference whether the defendant was arrested for a forfeiture or a misdemeanor, for the reasons discussed above, this Court must treat the arrest as being for a misdemeanor. Because of the defendant's prior conviction, he had to be charged with the misdemeanor offense; and the penalty had nothing to do with the elements of the offense, as the Wisconsin Supreme Court ruled in *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

In its opinion in this case, the Wisconsin Supreme Court treated the arrest of the defendant as being for the forfeiture offense. In doing so, the court apparently acted on a belief that knowledge of the defendant's prior conviction was relevant to probable cause. However, this was erroneous since the penalty provision is not pertinent to the elements of the offense, as the supreme court said in *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867. *See also Banks*, 105 Wis. 2d at 42, 313 N.W.2d at 71.[3]/ This Court is not required to accept the Wisconsin Supreme Court's erroneous belief that the arrest was for a forfeiture. This Court can independently evaluate the facts and circumstances known to the police officer; and if those facts show probable cause for a misdemeanor, then this Court should treat the arrest as being for a misdemeanor. *See United States v. Bonds*, 422 F.2d 660, 664 (8th Cir. 1970).

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[3]/ In the instant case, the state was not able to rely on the *McAllister* opinion for support in the state courts because the *McAllister* case was decided after the *Welsh* case was briefed and argued. *See* the dates listed on the title pages of the opinions in *State v. Welsh*, 108 Wis. 2d 319, 321 N.W.2d 245 (1982), and *McAllister*, 107 Wis. 2d at 532, 319 N.W.2d at 865.

In summary, because the defendant had a prior conviction within five years, he had to be charged with the misdemeanor offense of drunk driving for his arrest on April 24, 1978. As will be noted later in this brief, the police had probable cause to believe that the defendant had violated the drunk driving statute. Therefore, when the police arrested the defendant, the arrest was for a misdemeanor offense even if the police did not know of the prior conviction.

II. Whether The Defendant Was Arrested For A Misdemeanor Or A Forfeiture Offense, The Arrest Was Valid If The Police Had Probable Cause To Believe He Committed The Offense Of Drunk Driving And Exigent Circumstances Existed To Justify Their Failure To Obtain A Warrant.

In *Payton*, this Court ruled that in the absence of consent or exigent circumstances a warrant is needed to enter the residence of an accused to arrest him. 455 U.S. at 590, 603. *See also Steagald*, 451 U.S. 211-12.

Payton involved a warrantless entry to make a felony arrest; but the state contends that the same rules apply for arrests for all offenses, whether they are labeled felony, misdemeanor or forfeiture, as long as the offense could be classified as a crime within the limits of the Eighth Amendment of the United States Constitution. This rule will result in a uniform application of the constitution in all the states.

Applying the *Payton* test to the instant case, the Wisconsin Supreme Court held that the arrest of the defendant in his home was valid because the police possessed information that gave them probable cause to believe that the defendant was guilty of drunk driving,

and exigent circumstances existed because absent an immediate arrest evidence would be destroyed by the dissipation of the alcohol in the defendant's blood.

The defendant contends that without a warrant the police cannot constitutionally arrest an accused person in his home for a misdemeanor crime or a forfeiture offense because the common law rules of arrest were made part of the United States Constitution by the adoption of the fourth amendment; and under the common law a police officer could not make a warrantless arrest for a misdemeanor, even in a public place, unless the misdemeanor was committed in his presence. The defendant contends that because he did not commit the offense of drunk driving in the presence of an officer, he could not constitutionally be arrested even for the misdemeanor offense of drunk driving and even in a public place. Therefore, he concludes that without a warrant the police could not constitutionally arrest him in his home for the forfeiture offense of drunk driving.

As argued above, the state contends the defendant was arrested for the misdemeanor offense of drunk driving. Nevertheless, whether the arrest was for the first offense of drunk driving (a forfeiture offense) or a subsequent offense of drunk driving (a misdemeanor offense) is not important for purposes of determining the constitutionality of the arrest. In either event, the arrest was valid. The reasons for the validity of the arrest can be summarized as follows:

First, the common law distinction between arrests for misdemeanors and arrests for felonies was not adopted by the fourth amendment. Thus, the constitutional limits on the rules for arrest are the same for all crimes and the states are free to enact laws giving the police the same powers to arrest for forfeiture offenses and misdemeanors as for felonies. If the fourth amendment permits arrests only for crimes, the word "crime" should be defined in

terms of the eighth amendment, *i.e.*, any conduct that could be prohibited as a crime within the limits of the eighth amendment should be considered a crime for purposes of fourth amendment rules of arrest and search and seizure. This will insure uniform constitutional rights throughout the country. Because drunk driving can be classified as a crime within the limits of the eighth amendment; and because the constitutional rules for arrest are the same for all crimes; the constitutionality of the arrest of the defendant is tested by the standards adopted in *Payton*. Under those standards, the defendant's arrest was valid because the police possessed probable cause and exigent circumstances existed.

Second, in the alternative, if this Court concludes that the constitution preserved the common law distinction between misdemeanor arrests and felony arrests, for purposes of constitutional rules, the distinction still should be made in terms of the eighth amendment. In other words, for purposes of fourth amendment rules of arrest, a felony would be any offense that could be classified a felony under the eighth amendment. In the instant case, because drunk driving can be classified a felony under the eighth amendment, the rules of felony arrest would apply to the defendant's arrest regardless of whether the offense was labeled forfeiture or misdemeanor by the Wisconsin Legislature. Under the rules applicable to felony arrests, the arrest of the defendant in his home was valid because the police possessed probable cause and exigent circumstances existed.

Under either theory, it is important to use the eighth amendment to define the level of the offense for purposes of the fourth amendment rules of arrest so that application of the fourth amendment is consistent throughout the country. Constitutional rights should not be determined by the label a particular state affixes to prohibited conduct.

Third, if this Court concludes that the constitution preserved the common law distinctions between misdemeanor arrests and felony arrests and that the local legislature's label of felony or misdemeanor is controlling, the arrest of the defendant is valid because all warrant requirements have allowed exceptions to the rule. The state admits that usually a warrant is needed to enter a home to arrest the accused. However, typically warrants are not required where exigent circumstances exist. In this case, the exigent circumstances exception applies whether the arrest was for a misdemeanor or a forfeiture.

A. *The common law rules of arrest were not made part of the constitution by the adoption of the fourth amendment.*

The defendant argues that *Payton* and *United States v. Watson*, 423 U.S. 411 (1976), "recognized that the common law rules of arrest had been carried into the fourth amendment guarantees against unreasonable searches and seizures, *i.e.*, a warrantless arrest not permitted by the common law was constitutionally unreasonable." (Brief of Petitioner at 32.)

The state submits that the defendant is incorrect because the state does not believe that the common law rules of arrest were made part of the constitution by the adoption of the fourth amendment; at least the common law distinctions between felony arrests and misdemeanor arrests were not made part of the constitution.

The common law distinguished between felonies and misdemeanors by allowing officers to make warrantless arrests for felonies in public places on the basis of probable cause even if the felony was not committed in the officer's presence; however, in the case of a misdemeanor, the officer could make a warrantless arrest in a public place only if the offense was committed in the presence of the officer. *Watson*, 423 U.S. at 418, 419.

In *Watson*, this Court held that it was constitutional for the police to arrest a person in a public place if the police officer simply had probable cause to believe that the accused had committed a crime. 423 U.S. at 415, 423-24. The crime involved in *Watson* was a felony. 423 U.S. at 413 n.2, 415.

Justice Marshall dissented in *Watson* because he believed that, unless exigent circumstances existed, a warrant should be required to arrest a person in a public place. 423 U.S. at 435, 451. Justice Marshall believed that the majority of the Court in *Watson* eliminated the common law rules of arrest:

> Second, by paying no attention whatever to the substance of the offense, and considering only whether it is labeled "felony," the Court, in the guise of "constitutionalizing" the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone who they believe has committed any sort of crime at all. Certainly this rule would follow if the legislatures re-denominated all crimes as "felonies." As a matter of substance, it would seem to follow in any event from the holding of this case, for the Court surely does not intend to accord constitutional status to a distinction that can be readily changed by legislative fiat.

423 U.S. at 545-55 (footnote omitted).

If Justice Marshall is correct, the constitution makes no distinction between a misdemeanor and a felony in regard to the authority of the police to arrest in a public place. Because each is a crime, the arrest for either a misdemeanor or a felony can be made in a public place as long as the officer has probable cause. It makes sense to treat all crimes the same under the constitution. If the

constitution treated the officer's arrest authority differently depending on whether the crime was a felony or a misdemeanor, the state legislatures could effectively alter the accused's constitutional rights simply by changing the label attached to the crime or by redefining what they choose to call a felony. *See, e.g.*, sec. 939.60, Wis. Stats. (1981), which defines felony as a crime punished by imprisonment in the Wisconsin state prisons.

Justice Marshall must be correct in concluding that the constitution makes no distinction between police authority to make a misdemeanor arrest and the authority to make a felony arrest because, if the constitution made the distinction, it would sanction the paradox whereby states could indirectly grant the police greater arrest authority simply by classifying all crimes as felonies, but they could not directly grant the police greater authority by passing a law saying that the arrest authority for misdemeanors was the same as for felonies. Such a situation is avoided if the fourth amendment treats all offenses alike and permits the states to establish the arrest authority either directly or indirectly, as they choose. Wisconsin chose to take the direct route by authorizing the police to make arrests in traffic cases and misdemeanor cases on the basis of probable cause, the same standard applied in felony cases. *See* sec. 345.22, Wis. Stats. (1975), and sec. 968.07, Wis. Stats. (1975).

In *Payton*, this Court ruled in the context of a felony case that in the absence of consent or exigent circumstances the police need an arrest warrant to enter the accused's home to arrest him. 455 U.S. at 590, 603. *See also Steagald*, 451 U.S. at 211-12. *Payton* has been interpreted to permit a warrantless home entry to arrest the accused if police have probable cause and if exigent circumstances exist. *Welsh*, 108 Wis. 2d at 327, 321 N.W.2d at 250.

The state submits that, as in a public place where the constitutional rule of arrest is the same for a misdemeanor

as for a felony, see *Watson*, 423 U.S. at 454-55 (Marshall, J., dissenting), the constitutional rule for arrest in an accused's home should be the same for a misdemeanor as for a felony. In the case of either type of crime, a warrantless arrest should be valid as long as the police possess probable cause and exigent circumstances exist.

If the constitution required standards for the arrest of a misdemeanor different from the standards applied to the arrest for a felony, an accused's constitutional rights would change from state to state depending upon the label the various state legislatures placed on the offense. As applied to the instant case, the constitutional rules for entry of an accused's home would differ in Indiana, New York, Oklahoma and Texas where second offense drunk driving is a felony[4]/ from Wisconsin where the second offense drunk driving is a misdemeanor.[5]/

To ensure a uniform constitutional rule of arrest, the fourth amendment should treat all crimes the same. Whether crimes are classified as felonies or misdemeanors is largely a state matter, *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972); and legislative bodies may exercise a relatively wide discretion in classifying particular offenses as felonies or misdemeanors, *United States v. Watson*, 423 U.S. at 439 n.6 (Marshall, J., dissenting), quoting *Carroll v. United States*, 267 U.S. 132, 158 (1925). However, the legislative bodies do not have unlimited discretion in classifying offenses as misdemeanors or felonies. The eighth amendment imposes limits on what can be made criminal and punished as such as well as setting limits on what offenses can be classified and punished as felonies. *Rummel v. Estelle*, 445 U.S. 263, 269, 284 (1980).

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[4]/ Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982); N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. 1982-83); Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-83); Tex. Veh. Code Ann. § 6701 L-2 (Vernon Supp. 1982-83).

[5]/ Section 346.65(2), Wis. Stats. (1975), and sec. 346.65(2), Wis. Stats. (1981).

For the sake of uniformity under the constitution, the fourth amendment should view all crimes the same for purposes of search and seizure and arrest. In addition, any offense, whether a violation of federal or state or local laws, should be considered a crime for purposes of the fourth amendment if the offense could be classified as a crime within the limits of the eighth amendment. Under this approach, all the constitutional limits governing arrest and search and seizure will be contained within the four corners of the constitution where they cannot be altered by statutory changes. The limits will be set by the fourth and eighth amendments. Although states could still set tighter limits on the police officer's authority to arrest, the tighter limits would be based on state laws and constitutions; the different limits would not be a result of states altering federal constitutional rights through the labeling of offenses.

Under this approach, individuals do not lose any constitutional right that they already have. States have always been able to make any offense a crime and any crime a felony as long as the eighth amendment has been satisfied. After an offense has been classified a felony, the police have been able to enter the accused's home to make a warrantless arrest as long as the police had probable cause and exigent circumstances.

Under the approach suggested by the state in this brief, the constitution will recognize uniform police arrest authority regardless of the label the legislature attaches to the offense. The constitutional limits on the police officer's arrest authority will be based solely on the limits contained in the constitution and will not be based in part on the vagaries of state legislatures.

Under this approach, the police could enter the defendant's home if they had probable cause and exigent circumstances. This is so because under the eighth amendment drunk driving can be classified as a crime.

Indeed, most states classify drunk driving as at least a misdemeanor.[6]/ Several states classify second or subsequent offenses of drunk driving as felonies.[7]/

The approach to arrest and search and seizure problems suggested by the state provides a system of uniform rights under the constitution. Under this analysis, a person's constitutional rights do not change depending upon the label a state legislature places on an offense.

If the common law rules of arrest were not made part of the constitution, the various states by statute and state constitution can set different limits on the arrest authority of the police; but the United States constitutional limits and rights will not thereby be changed. Under the common law, the police officer did not have authority to arrest for a misdemeanor not committed in his presence. The states by statute or by state constitution should have

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[6]/ In the following states and the District of Columbia, the first conviction for drunk driving is punished as a misdemeanor:

Ala. Code § 32-5A-191 (Supp. 1982)
Alaska Stat. § 28-35-030 (Supp. 1982)
Ariz. Rev. Stat. Ann. § 28-692 (Supp. 1982-1983)
Ark. Stat. Ann. § 75-1027 (1979)
Cal. Veh. Code § 23152 (Deering Supp. 1983)
Conn. Gen. Stat. § 14-227(a) (1983)
Del. Code Ann. tit. 21, § 4177 (Supp. 1983)
Fla. Stat. Ann. § 316.193 (West Supp. 1983)
Ga. Code Ann. § 68A-902 (Supp. 1982)

(footnote continued)

[7]/ Drunk driving is classified a felony in the following states: Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982), second offense; Iowa Code Ann. § 321.281 (West Supp. 1982-1983), third and subsequent offenses; Mich. Comp. Laws Ann. § 257.625 (Supp. 1982-1983), third offense within ten years; Mo. Ann. Stat. § 577.023 (Supp. 1983), third offense within three years; N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. (182-1983), second offense within ten years; Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-1983), second offense; S.D. Codified Laws Ann. § 32-23-4 (1976), third and subsequent offenses; and Tex. Veh. Code Ann. § 6701L-2 (Vernon Supp. 1982-1983), second offense.

the power to alter the common law arrest authority of police officers. Typically, the common law can be changed by statute or state constitution. *See Silver v. Silver*, 280 U.S. 117, 122 (1929), and *Noble State Bank v. Haskell*, 219 U.S. 104, 113 (1911). The common law rule of arrest should not be an exception. In *Payton*, this Court pointed out that the common law rule of arrest developed in legal contexts that substantially differ from the cases arising today. 445 U.S. at 591. In *Steagald*, this Court said in 451 U.S. at 217 n.10:

> The significance accorded to such authority [referring to the common law as being instructive by determining what sort of searches and seizures the framers of the fourth amendment regarded as reasonable], however, must be kept in perspective, for our decisions in this area have not "simply frozen into constitutional law

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Hawaii Rev. Stat. § 291-4 (Supp. 1982)
Idaho Code § 49-1102 (1980)
Ill. Ann. Stat. ch. 95 1/2, § 11-501 (Smith-Hurd Supp. 1982-1983)
Ind. Code Ann. § 9-4-1-54 (Burns Supp. 1982)
Iowa Code Ann. § 321.281 (West Supp. 1982-1983)
Kan. Stat. Ann. § 8-1567 (1982)
La. Rev. Stat. Ann. § 14.98 (West Supp. 1983)
Me. Rev. Stat. Ann. tit. 29, § 1312B (Supp. 1982-1983)
Md. Transp. Code Ann. § 21-902 (Supp. 1982)
Mich. Comp. Laws Ann. § 257.625 (Supp. 1982-1983)
Minn. Stat. Ann. § 169.121 (West Supp. 1983)
Miss. Code Ann. § 63-11-30 (Supp. 1982)
Mo. Ann. Stat. § 577.010 and § 577.012 (Supp. 1983)
Neb. Rev. Stat. § 39-669-07 (1978)
Nev. Rev. Stat. § 484.379 (1981)
N.H. Rev. Stat. Ann. § 265:82 (1982)
N.J. Stat. Ann. § 39:4-50 (West Supp. 1982-1983)
N.M. Stat. Ann. § 66-8-102 (Supp. 1983)
N.Y. Veh. & Traf. Law § 1192 (McKinney Supp. 1982-1983)
N.D. Cent. Code § 39-08-01 (Supp. 1981)
Ohio Rev. Code Ann. § 4511.19 (Page Supp. 1982)
Okla. Stat. Ann. tit. 47, § 11-902 (West Supp. 1982-1983)

(footnote continued)

those enforcement practices that exited at the time of the fourth amendment's passage." *Payton v. New York*, 445 U.S. at 591 n.33. The common-law rules governing searches and arrest evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper. *Cf. Katz v. United States*, 389 U.S. 347, 352-353 (1967). Instead, the amendment's prohibition against "unreasonable searches and seizures" must be interpreted "in light of contemporary norms and conditions." *Payton v. New York, supra*, at 591 n.33.

Several courts have already concluded that the common law rules of arrest are not part of the United States Constitution and that the states are therefore free to alter the common law and to give police the same authority to arrest for misdemeanors that they had at common law to arrest for felonies, *i.e.*, the authority to arrest for a crime committed outside their presence as long as they have probable cause. *See Street v. Surdyka*,

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Or. Rev. Stat. § 487.540 (1981)
Pa. Cons. Stat. Ann. tit. 75, § 3731 (Purdon Supp. 1983-1984)
R.I. Gen. Laws § 31-27-2 (Supp. 1982)
S.D. Codified Laws Ann. § 32-23-1 (1976)
Tenn. Code Ann. § 55-10-401 (Supp. 1982)
Tex. Veh. Code Ann. § 6701L-1 (Vernon Supp. 1982-1983)
Utah Code Ann. § 41-6-44 (Supp. 1981)
Vt. Stat. Ann. tit. 23, § 1201 (Supp. 1982)
Va. Code § 18.2-266 (1982)
Wash. Rev. Code Ann. § 46.61.515 (Supp. 1983-1984)
W. Va. Code § 17C-5-2 (Supp. 1982)
Wyo. Stat. § 31-5-229 (Supp. 1982)
D.C. Code Ann. § 40-716 (Supp. 1982)

492 F.2d 368, 371-72 (4th Cir. 1974); *Diamond v. Marland*, 395 F. Supp. 432 (S.D. Ga. 1975); *United States v. Grosso*, 225 F. Supp. 161, 170 (W.D. Pa. 1964); *In the Matter of Gardner*, 39 N.C. App. 567, 251 S.E.2d 723 (1979); *City of Columbus v. Herrell*, 18 Ohio App. 2d 149, 247 N.E.2d 770, 773 (1969); *Commonwealth v. Levesque*, 469 Pa. 118, 364 A.2d 932, 937 (1976); and *State v. Berker*, 391 A.2d 107 (R.I. 1978). The rationale for these decisions was explained in *Street*, 492 F.2d at 371-72:

> The constitutional restrictions on arrest are derived from the fourth amendment's prohibition of unreasonable seizures. Because the Supreme Court has interpreted the fourth amendment in light of the law that existed when the Bill of Rights was adopted, *see, e.g., Carroll v. United States*, 267 U.S. 132, 149-51, 45 S. Ct. 280, 69 L.Ed. 543 (1925), it might be argued that the fourth amendment incorporates the common law's restrictions on warrantless arrests for misdemeanors. But the supreme court has never given constitutional force to this element of the common law. In *Bad Elk v. United States*, 177 U.S. 529, 20 S. Ct. 729, 44 L.Ed. 874 (1900), the Court applied the common law rule but hinted that its restrictions could be relaxed by statute. Subsequent cases have focused entirely on the requirement of probable cause. *See Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L.Ed.2d 142 (1964); *Henry v. United States*, 361 U.S. 98, 80 S. Ct. 168, 4 L.Ed.2d 134 (1959). We do not think the fourth amendment should now be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence. *The difference between felonies and misdemeanors is no longer as significant as it was at common law. See Carroll v. United States*, 267 U.S. 132, 158, 45 S. Ct. 280, 69 L.Ed. 543 (1925). Maryland

> courts have criticized the continued use of the common law rule as impractical and illogical, and have invited the state legislature to adopt new rules. *Robinson v. State*, 4 Md. App. 515, 243 A.2d 879 (1968). Classifications based on other criteria could be both rational and practical. For example, Congress has authorized warrantless arrests on probable cause for any violation of the federal laws pertaining to narcotics or marijuana. 26 U.S.C. sec. 7607. We are most reluctant to adopt a constitutional interpretation that would impede reform in this area. The fourth amendment protects individuals from unfounded arrest by requiring reasonable grounds to believe a crime had been committed. The states are free to impose greater restrictions on arrest, but their citizens do not thereby acquire a greater federal right.

(Footnotes omitted and emphasis added.)

It has been pointed out that this Court has never held that the constitution requires a warrant to arrest for a misdemeanor occurring out of the presence of an officer. 2 LaFave, *Search & Seizure*, sec. 5.1 at 231 (1978).

In *Bad Elk v. United States*, 177 U.S. 529 (1900), which was referred to in *Street*, this Court applied the common law rule of arrest but said it could "not find any statute of the United States or of the State of South Dakota giving any right to these men to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence." 177 U.S. at 535. The Court, therefore, implied that it would have been constitutional for the United States or South Dakota to pass the statute giving the police officers broader arrest authority than they had at common law.

The lawfulness of an arrest is determined by state law insofar as the law does not violate the United States Constitution. *Ker v. California*, 374 U.S. 23, 34, 37 (1963); and *Klingler v. United States*, 409 F.2d 299, 302 (8th Cir. 1969). As argued up to now, the State of Wisconsin submits that its legislature and supreme court have not acted unconstitutionally in holding that under Wisconsin's law of arrest the police have the authority to arrest the defendant in his home for drunken driving on the basis of probable cause and the existence of exigent circumstances. The arrest is constitutional because under the fourth amendment all offenses that could be classified as crimes can be treated the same and Wisconsin acted constitutionally in so treating them. Therefore, it is constitutional to judge the entry into defendant's home by the standard established in *Payton, i.e.*, did the police possess probable cause and did exigent circumstances exist?

B. Even if the common law rules of arrest were adopted as part of the United States Constitution, the arrest of the defendant was valid because drunk driving qualifies as a felony under the eighth amendment limits.

Even if this Court concludes that the common law distinctions between misdemeanor arrests and felony arrests were incorporated into the constitution by the adoption of the fourth amendment, and even if this Court applies the rule of *Payton* only to offenses that could be classified as felonies under the eighth amendment, the police acted properly in this case because drunk driving is

a serious enough offense that under the eighth amendment it could be classified as a felony.[8]/

On several occasions, this Court has acknowledged the seriousness of drunk driving.[9]/ In *South Dakota v. Neville*, _ U.S. _, 103 S. Ct. 916, 920 (1983), this Court said:

> The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here.

In *Mackey v. Montrym*, 443 U.S. 1, 17 (1979), this Court said:

> States surely have at least as much interest in removing drunken drivers from their highways

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[8]/ If the Court concludes that the common law distinctions between misdemeanors and felonies in regard to the rules of arrest were incorporated in the constitution, the state submits that for purposes of the fourth amendment the terms felony and misdemeanor should still be defined by the limits set by the eighth amendment. In other words, for the purposes of the fourth amendment, any offense should be considered a felony if it could be classified as a felony under the eighth amendment. Any other offense that could be classified as a crime, but not a felony, under the eighth amendment would be a misdemeanor. As pointed out above, this approach would ensure a uniform application of the constitution throughout the country.

[9]/ The defendant in his brief contends that the Wisconsin Legislature has determined that drunk driving is a minor offense (Brief of Petitioner at 19). The *amicus curiae* brief implies that the first offense of drunk driving in Wisconsin is not a serious offense because it does not carry a jail penalty (Brief of *Amicus Curiae* at 19-20). The state submits that the Wisconsin Legislature does not consider drunk driving to be a minor or nonserious offense. The reason the first offense of drunk driving is a forfeiture was explained in *County of Walworth v. Rohner*, 108 Wis. 2d at 718-22. In Wisconsin, the state constitution does not permit local governments to create crimes. Statutes, however, authorize local governments to create ordinances

(footnote continued)

> as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs.

(Footnote omitted.)

In the footnote to that statement, this Court pointed out that in 1975 alone drunk drivers accounted for 283 of the 884 traffic fatalities in Massachusetts; and the Court noted that traffic deaths commonly exceed 50,000 annually in the United States and approximately one half of these fatalities are alcohol related. *Mackey*, 443 U.S. at 17 n.9.

The Wisconsin Supreme Court in *Welsh* cited statistics similar to those used in *Mackey:*

> In 1980, 583 drivers were killed [in Wisconsin]. Of these drivers, 470 were tested for blood alcohol content, and 269 were found to be legally intoxicated, having a minimum blood alcohol

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prohibiting drunk driving, but the penalty must be a forfeiture.In order to treat first offense drunk drivers equally under local and state law, the state law treats first offenses as forfeitures. Therefore, the first offender receives the same treatment whether he is arrested by a state or a local official. All subsequent offenses within five years must be charged under the state law as crimes. Thus, the legislature made first offense drunk driving a forfeiture, not because it believed the offense to be minor, but in order to ensure equal treatment for all persons arrested for first offense drunk driving.

The *amicus curiae* brief cites *Baldwin v. New York*, 399 U.S. 66, 68 (1970), and *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), as authority for the proposition that drunk driving is not a serious offense in Wisconsin *(Amicus Curiae* Brief at 20). Those cases are inapplicable to the instant case. They were concerned with the right to a jury trial under the sixth amendment. This case is concerned with the constitutionality of arrest under the fourth amendment. The fourth amendment and the sixth amendment are concerned with different interests, *Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973); and therefore, sixth amendment cases are not necessarily controlling on fourth amendment issues. However, to the extent that *Baldwin* and *Duncan* are relevant to the instant case, they help the state's position. In *Baldwin*, this Court concluded that for purposes of an accused being entitled to a jury trial a "serious offense" is one in which the accused

> content of .10 percent. *Wisconsin Accident Facts* 1 (1981). Similarly in 1978, 576 drivers were killed; while 226 of the 448 tested were found to be legally intoxicated. *Wisconsin Accident Facts* 1 (1979).

Welsh, 108 Wis. 2d at 335 n.9, 321 N.W.2d at 253 n.9.

In *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957), this Court said in the context of a case where a driver was tested for intoxication:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.

(Footnote omitted.)

In *State v. Jennings*, 112 Ohio App. 455, 176 N.E.2d 304, 307 (1959), the court said that an automobile becomes a dangerous instrument when it is being operated by one under the influence of intoxicating liquor and, when so operated, the automobile becomes a public menace.

Justice Marshall was reported to have made a comment in the oral argument in *Solem v. Helm*, 33 Crim. L. Rptr. 4003 (No. 82-492, argued March 29, 1983), that was similar to that made by the Ohio court. Justice Marshall was quoted as saying that a defendant's "drunk driving conviction is close to a violent act; he was lucky that something serious didn't happen. A lot of states recognize cars as dangerous weapons." 33 Crim. L. Rptr. 4005.

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faces a possible sentence of imprisonment of more than six months. In the instant case, the defendant was arrested and charged with the second offense of drunk driving and faced a possible jail sentence of one year. *See* sec. 346.65(2), Wis. Stats. (1975). Therefore, under the cases cited in the *amicus curiae* brief, the defendant was arrested for a serious offense.

In the instant case, the defendant was fortunate that his drunk driving did not result in an accident. Jablonic testified that the defendant was driving in the wrong lane of traffic and at the last moment veered off the highway avoiding a head-on collision when another car was approaching (R. 13:9)

Because the eighth amendment would permit a state to classify drunk driving as a crime, even a felony, the fourth amendment should allow a person to be arrested in his home for drunk driving on the basis of probable cause and exigent circumstances. The limits imposed by the United States Constitution should be the same throughout the country. What a police officer can do constitutionally in Wisconsin should be the same that he can do constitutionally in Texas, New York, Oklahoma and Indiana. Also, the accused persons should have the same rights under the constitution in Texas, New York, Oklahoma and Indiana as in Wisconsin.

C. *Even if the United States Constitution adopted the common law rules of arrest, and even if the labels placed on the offenses by the local legislatures are controlling, the arrest in the instant case was valid.*

Even if this Court concludes that the common law rules of arrest were made part of the constitution by the adoption of the fourth amendment and that the label placed on conduct by local legislatures determines whether the offense is a forfeiture, misdemeanor or felony for constitutional purposes, the arrest of the defendant in the instant case is valid. This is so because this Court has recognized an exception to the warrant requirement when exigent circumstances exist. This exception applies to arrests for forfeitures and misde-

meanors as well as to arrests for felonies.[10]/ In addition, this Court has approved the warrantless entry into a home to search for evidence in the case of a misdemeanor.

Decisions from this Court have indicated that the test for the warrantless entry into a home under the fourth amendment is the same for misdemeanors as for felonies — in either case the warrantless entry is valid as long as the police possess probable cause and exigent circumstances exist. When the crime is considered a felony, *Payton* is authority for entry to arrest based on probable cause and exigent circumstances. When the crime is a misdemeanor, *Camara v. Municipal Court*, 387 U.S. 523 (1967), provides authority to enter to arrest on the basis of probable cause and exigent circumstances.

In *Camara*, the Court considered whether a building inspector needed a warrant to enter a residence to check for building code violations when the resident refused to

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[10]/ The defendant has argued that a warrantless entry cannot be made at night to make an arrest for a minor offense. The state contends that, when the police possess probable cause and exigent circumstances exist, the warrantless entry can be made regardless of the time of day or the degree of the offense. For support for his argument, the defendant cites Justice White's dissenting opinion in *Payton*, which suggests that warrantless felony arrests be allowed in the home in the daytime. The state submits that the defendant's argument is incorrect for at least two reasons. First, drunken driving is not a minor offense. Second, the state submits that the defendant has misread the comment by Justice White, who said in *Payton*, 445 U.S. at 616:

> Today's decision ignores the carefully crafted restrictions on the common-law power of arrest entry and thereby overestimates the dangers inherent in that practice. At common law, *absent exigent circumstances*, entries to arrest could be made only for felony. Even in cases of felony, the officers were required to announce their presence, demand admission, and be refused entry before they were entitled to break doors. Further, it seems generally accepted that entries could be made only during daylight hours. And, in my view, the officer entering to

(footnote continued)

give consent for the entry. A violation of the code constituted a misdemeanor. *See* 387 U.S. at 527 n.2. This Court decided that normally search warrants are needed to enter the residence to check for code violations, 387 U.S. at 534; but the Court said its decision did not foreclose warrantless inspection in emergency situations, 387 U.S. at 539. The Court decided that the warrantless entry in the *Camara* case was invalid because there was no emergency demanding immediate access. 387 U.S. at 540.

Camara is important to the instant case because in *Camara* this Court indicated that the warrantless entry of a residence in an emergency situation to search for evidence of a misdemeanor was constitutional. In *Payton* and *Steagald,* this Court said that under the fourth amendment the same rules apply to arrest that apply to searches and seizures. *Payton,* 455 U.S. at 585, 588-89,

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arrest must have reasonable grounds to believe, not only that the arrestee has committed a crime, but also that the person suspected is present in the house at the time of entry.

(Emphasis added; footnotes omitted.)

The defendant cites this statement to support his argument that nighttime warrantless arrests are invalid.

The state submits that Justice White's comment supports its position. As the state understands the *Payton* decision, Justice White dissented because he felt that the police should be able to make warrantless entries into a suspect's home to arrest him, even in the absence of exigent circumstances, as long as the officers announce their presence, demand admission, enter only in daylight and have probable cause to arrest for a felony. The state understands this to mean that when there are exigent circumstances, most of the requirements do not have to be satisfied; *i.e.,* in the case of exigent circumstances, the entry does not have to be announced, the entry can be made at night, and the arrest can be made for a misdemeanor. However, probable cause is always required.

Under this interpretation of Justice White's comments, the entry into the defendant's home was constitutional because the police had probable cause and exigent circumstances existed.

590; *Steagald*, 451 U.S. at 212. Therefore, if under *Camara* an officer can make a warrantless entry in an emergency situation to search for evidence of a misdemeanor, the officer can make a warrantless entry in an emergency situation to arrest for a misdemeanor, if the officer has probable cause. Thus, the same rule of arrest applies to misdemeanors and felonies alike. Under *Camara* and *Payton*, the officer can enter a home to make a warrantless arrest as long as he possesses probable cause and exigent circumstances exist.[11]/

This rule is no more than an application of the usual exception to the warrant requirement. The state does not dispute that normally an officer needs an arrest warrant to arrest an accused person in his home for any offense, whether it is a felony, misdemeanor or forfeiture. However, exigent circumstances typically constitute an exception to the warrant requirement. *Watson*, 423 U.S. at 431 (Powell, J., concurring), and *Watson*, 423 U.S. at 435, 437 (Marshall, J., dissenting). Therefore, the State of Wisconsin is not asking this Court to expand the authority of police officers in order to rule that the arrest in the instant case is valid. The state is only asking the Court to apply the usual rule that warrantless action is valid when exigent circumstances exist and the police possess probable cause.

The arrest of the defendant is valid even if this Court believes that the defendant was arrested for a forfeiture offense of drunk driving rather than a misdemeanor offense. In a forfeiture case, an accused is entitled to the same fourth amendment protection as in a criminal case. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697-98 (1965). Quoting from *Boyd v. United States*, 116

[11]/ An entry into a home to make an arrest for a misdemeanor was approved in *State v. Niedermeyer*, 48 Or. App. 665, 617 P.2d 911, 913 (1980), *cert. denied*, 450 U.S. 1042 (1981), on the ground that the police possessed probable cause and exigent circumstances existed. In *Niedermeyer*, hot pursuit qualified as the exigent circumstance.

U.S. 616, 633-34 (1886), this Court said that suits for forfeiture "'are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution.'" *One Plymouth Sedan*, 380 U.S. at 697-98. The state submits that in the forfeiture proceeding the accused is entitled to the same fourth amendment rights he receives in a criminal proceeding; but that he is not entitled to any more fourth amendment rights. Therefore, the rules of arrest applicable to crimes under the fourth amendment are the same for forfeitures; and the entry of the home is valid if the police possessed probable cause and exigent circumstances existed.

To summarize, under any of the theories used by the state above, for the purposes of a constitutional challenge it makes no difference whether the defendant was arrested for an offense that was labeled as a forfeiture or a misdemeanor under Wisconsin law at the time. The arrest was valid under the fourth amendment if at the time of the arrest the police possessed probable cause to believe the defendant had committed an offense and exigent circumstances existed to justify the failure to obtain a warrant. The state submits that both requirements were satisfied in this case.

III. At The Time Of The Arrest, The Police Possessed Probable Cause To Arrest The Petitioner For The Offense Of Operating A Motor Vehicle While Under The Influence Of An Intoxicant.

The defendant was arrested in his home for operating a motor vehicle while under the influence of an intoxicant (R. 13:38; J.A. 46).

The elements of that offense are that the accused (1) drove or operated a motor vehicle and (2) that he did so

while under the influence of an intoxicant. *McAllister*, 107 Wis. 2d at 535, 319 N.W.2d at 867.

The Wisconsin Supreme Court found that the police had probable cause to arrest the defendant. *Welsh*, 108 Wis. 2d at 329-35, 321 N.W.2d at 251-54. In this Court, the defendant has not challenged that conclusion of the Wisconsin Supreme Court. Therefore, in this Court there is no question that the police had probable cause to arrest the defendant. The first requirement of a valid warrantless arrest has been satisfied.

IV. Exigent Circumstances Existed To Justify The Warrantless Arrest Of The Defendant.

The Wisconsin Supreme Court found that for three reasons exigent circumstances existed to justify the immediate, warrantless arrest of the defendant in his home. The circumstances cited by the Wisconsin Supreme Court were hot pursuit, the imminent threat to safety doctrine and the probable destruction of evidence. *Welsh*, 108 Wis. 2d at 336-39, 321 N.W.2d at 254-55.

A. Hot pursuit.

This Court has long recognized that "hot pursuit" cases fall within the exigent circumstances exception to the warrant requirement. *Steagald*, 451 U.S. at 218; *United States v. Santana*, 427 U.S. 38, 43 (1976); and *Warden v. Hayden*, 387 U.S. 294 (1967).

In *Santana*, this Court said that hot pursuit involves some sort of a chase. 427 U.S. at 43. However, some cases since *Santana* have justified warrantless entries even though the police did not chase the accused persons into the homes. In these cases the offenses were quickly reported to the police who acted on the basis of informa-

tion received from witnesses and arrived at the suspects' homes within minutes of the commission of crimes. *United States v. Stubblefield*, 621 F.2d 980, 982-83 (9th Cir. 1980), and *People v. Baca*, 198 Colo. 399, 600 P.2d 770, 772 (1979). Two other cases have approved the warrantless entries of homes to arrest suspects for misdemeanors when the police possessed probable cause and hot pursuits satisfied the exigent circumstance requirement. *State v. Penas*, 200 Neb. 387, 263 N.W.2d 835 (1978), and *Niedermeyer*, 617 P.2d at 913.

In *Welsh*, the Wisconsin Supreme Court said that the hot pursuit doctrine has evolved to encompass situations where time was of the essence, *i.e.*, where requiring the police to obtain a warrant would constitute undue delay. 108 Wis. at 336, 321 N.W.2d at 254. This analysis is consistent with the approach used by the courts in *Stubblefield* and *Baca*.

The Wisconsin Supreme Court pointed out that the defendant, "fearful of the officer's impending arrival and recognizing the possibility of being requested to submit to a blood alcohol test, left the scene of the accident upon discovering that the officer had been summoned." 108 Wis. 2d at 336, 321 N.W.2d at 254. Randy Jablonic had testified that when the defendant approached his truck Jablonic refused to give him a ride home and told him to wait to get help to get the car out (R. 13:12). Jablonic then testified that the defendant was concerned that he (Jablonic) would call the cops. (R. 13:12).

The defendant left Jablonic and walked to his home. The police arrived at the accident scene, talked to Jablonic and went to the defendant's home. The trial court concluded that the police arrived at the defendant's home within ten minutes of the defendant leaving the accident scene (R. 14:35; J.A. 79).

Emphasizing the importance of quick action by the police, the Wisconsin Supreme Court said that if the

officers had retreated to obtain a warrant "rather than immediately pursuing and arresting the suspect, the requirements of the blood alcohol statutes would have been frustrated." *Welsh*, 108 Wis. 2d at 336, 321 N.W.2d at 254.

The hot pursuit doctrine applied to these facts where the defendant left the accident scene when he learned that the police had been called and where the police responded quickly to the call for assistance and were able to reach the defendant's home within ten minutes of his leaving the accident scene. As noted by the Wisconsin Supreme Court, time was of the essence because the police had to preserve evidence of the defendant's level of alcohol consumption. This required quick action by the police and justified the hot pursuit. As will be discussed later, the need to prevent the destruction of evidence also supplied an independent ground for finding the existence of exigent circumstances. However, that ground was in addition to the hot pursuit.

B. The imminent threat to safety.

The Wisconsin Supreme Court also justified the warrantless arrest of the defendant on the ground that prompt action by the police prevented "the driver from returning to his car, or another automobile, where he could have continued to drive in his current state posing a danger to himself and the public." *Welsh*, 108 Wis. 2d at 337, 321 N.W.2d at 255. The Wisconsin court concluded that the nature of the offense, coupled with the potential threat to public safety, satisfied the exigent circumstances test pursuant to the imminent threat to safety doctrine. 108 Wis. 2d at 337-38, 321 N.W.2d at 255.

In *State v. Martin*, 275 S.C. 141, 268 S.E.2d 105, 107 (1980), the South Carolina Supreme Court said a police officer was justified in making a warrantless arrest of a suspected drunken driver at an accident scene because

"[a]n intoxicated person who has just been in an accident and who still has the opportunity to operate his vehicle presents a clear and present danger to the community." Thus, the South Carolina Supreme Court also recognized that the danger posed by a drunk driver returning to his car and driving can justify action by the police that might otherwise be illegal.

In the instant case, the defendant contends that he posed no danger to the community because he had returned home, undressed and gone to bed. However, in making this argument the defendant forgets that this Court must be concerned with information known to the police officer, not the facts known by the defendant. When the police officers entered the defendant's home there was no way for them to know that he was in bed. For all the officers knew, the defendant was prepared to walk the short distance to his car to retrieve it from the cemetery and to continue driving about the city in his intoxicated condition. Therefore, the fact that the defendant was in bed cannot defeat an otherwise valid reason for the police to act in the interest of defusing a threat to public safety.

C. Prevention of the destruction of evidence.

The final reason the Wisconsin Supreme Court gave for finding that exigent circumstances existed was that an immediate arrest was needed to prevent the probable destruction of evidence. 108 Wis. 2d at 338, 321 N.W.2d at 255. The court noted that alcohol rapidly metabolizes in the blood after a person stops drinking and "[w]ithout an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of the defendant's alleged violation" of the drunk driving law would be destroyed. 108 Wis. 2d at 338, 321 N.W.2d at 255.

The state submits that the prevention of the imminent destruction of evidence provides the strongest reason for finding that in the instant case exigent circumstances existed to justify the warrantless entry of the defendant's home to arrest him.

This Court has recognized that the threat of the removal or destruction of evidence, when coupled with probable cause, justifies a warrantless entry of a suspect's home to arrest or to search. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); *United States v. Santana*, 427 U.S. 38, 43 (1976); *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *McDonald v. United States*, 335 U.S. 451, 455 (1948); and *Johnson v. United States*, 333 U.S. 10, 15 (1948).

In *Schmerber v. California*, 384 U.S. 757, 770-71 (1966), this Court ruled that the diminishing of the percentage of alcohol in the blood that begins shortly after drinking stops justified the warrantless seizure of a blood sample from a suspected drunken driver. The Court ruled that this threatened destruction of evidence posed an emergency that justified the warrantless action. 384 U.S. at 770-71. Numerous other courts have agreed with *Schmerber* that the loss of alcohol from the blood constitutes an exigent circumstance that permits the warrantless seizure of evidence. *United States v. Harvey*, 701 F.2d 800, 803 (9th Cir. 1983); *People v. Rodriguez*, 645 P.2d 857, 860 (Colo. Ct. App. 1982); *State v. Williams*, 417 So. 2d 755, 756 (Fla. Ct. App. 1982); *People v. Bell*, 41 Ill. App. 3d 233, 355 N.E.2d 38, 40-41 (1976); *DeVaney v. State*, 259 Ind. 483, 288 N.E.2d 732, 735 (1972); *Pollard v. State*, 439 N.E.2d 177, 182, 183 (Ind. Ct. App. 1982); *Shultz v. State*, 417 N.E.2d 1127, 1138 (Ind. Ct. App. 1981); *State v. Oevering*, 268 N.W.2d 68, 72 (Minn. 1978); *Gregg v. State*, 374 So. 2d 1301, 1303-04 (Miss. 1979); *State v. Campbell*, 615 P.2d 190, 196 (Mont. 1980); *State in Interest of M.P.C.*, 165 N.J. Super. 131, 397 A.2d 1092, 1094 (1979); *Commonwealth v. Trefry*, 249 Pa. Super. 117, 375 A.2d 786, 793 (1977); *Hayes v. State*, 634 S.W.2d 359, 363 (Tex. Ct. App.

1982); and *Aliff v. State*, 627 S.W.2d 166, 169, 170 (Tex. Ct. App. 1982).

In *Schmerber*, this Court said that ordinarily search warrants would be required to obtain a blood sample from a suspect:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.

384 U.S. at 770.

In comparing the search of a dwelling with the search of a human body, this Court indicated that absent a warrant the state would have to make as great a showing of an emergency to search the body as to search the home. In *Schmerber*, the possible destruction of evidence by the alcohol metabolizing in the blood qualified as an emergency justifying the warrantless seizure of the blood sample from the body. If loss of evidence of intoxication justifies entering the human body, then, under *Schmerber*, it logically follows that the threat of loss of the same evidence justifies entry into a home to obtain the evidence. Since the fourth amendment rules governing search and seizure are the same as those governing arrest, *Payton*, 445 U.S. at 590; *Steagald*, 451 U.S. at 212, the prevention of the loss of evidence of intoxication provides the emergency needed to make the warrantless entry into the home to arrest the defendant and to obtain evidence of the level of alcohol in the blood.

In other cases this Court has implied even more strongly that the prevention of the destruction of intoxication provides the exigent circumstance needed to make a warrantless entry into a home. In *Vale*, the warrantless entry into the suspect's home was ruled unconstitutional. In explaining why the entry was illegal, this Court noted that no one claimed that the police were responding to an

emergency. 399 U.S. at 35. The Court said: "The goods ultimately seized were not in the process of destruction. *Schmerber v. California*, 384 U.S. 757, 770-71." *Vale*, 399 U.S. at 35.

The state submits that it is significant that this Court cited *Schmerber* in a home entry case. The citation of *Schmerber* in *Vale* indicates that the threat of the destruction of the evidence of alcohol in the blood would justify the warrantless entry into the home. Such a justification exists in the instant case.

Also, in *Camara*, this Court cited *Schmerber* as a case exemplifying the type of situation where a warrant is not necessary because "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." 387 U.S. at 533. The citation of *Schmerber* in *Camara* is important because the issue in that case was whether a warrant was required to enter a residence to search for evidence of a misdemeanor violation of the building code. In other words, the citation of *Schmerber* in *Camara* indicates that the loss or the destruction of alcohol in the blood would justify the warrantless entry into the home to search for evidence of a misdemeanor.

Camara also adds further support to the state's position when read together with *Mackey v. Montrym*, 443 U.S. 1 (1979). In *Camara*, this Court said that the warrantless entry of the residence to search for a misdemeanor building code violation would be justified in emergency situations, such as the seizure of unwholesome food in *North American Cold Storage Company v. City of Chicago*, 211 U.S. 306 (1908). *See Camara*, 387 U.S. at 539. In *Mackey*, this Court said that states have at least as much interest in removing drunk drivers from their highways as in summarily destroying spoiled foodstuffs, citing the same *North American Storage* case that was cited in *Camara*. *See Mackey*, 443 U.S. at 17-18. The state

submits that if its interest in seizing unwholesome food creates a sufficient emergency to justify the warrantless entry of a residence, as implied in *Camara*, 387 U.S. at 539; and if the state's interest in removing drunk drivers from the highway is as sufficient as seizing unwholesome food, as stated in *Mackey*, 443 U.S. at 17-18; then the state's interest in removing drunk drivers from the highway should justify the warrantless entry into the suspect's home, especially when the entry is made only to avoid the destruction of evidence that will surely be lost unless quickly seized.

The defendant argues that, for three reasons, the prevention of the loss of evidence of alcohol in the blood is not sufficient to justify the warrantless entry into the home. First, the defendant contends that the evidence may not be obtained anyway because he may refuse to give his consent to the breathalyzer test. However, under *Schmerber*, the state could forceably obtain evidence of the alcohol level in the blood. *See Neville*, 103 S. Ct. at 921; and *Trefry*, 375 A.2d at 792. Also, if the defendant refuses to give his consent to the test, the state can introduce evidence of the refusal at the defendant's trial on drunk driving. *Neville*, 103 S. Ct. at 916.

Second, the defendant contends that he may drink more alcohol before the police reach his home and thereby he will destroy the validity of any test. The state submits that this possibility is the strongest reason for permitting the police to make a warrantless entry to prevent the destruction of evidence. The time the police would take to obtain a warrant provides the defendant with even more time to drink more alcohol and to destroy the validity of a test. In order to reduce the chances of the defendant drinking more alcohol, the police must be permitted to enter the defendant's home and arrest him as soon as possible.

Finally, the defendant contends that alcohol does not dissipate all that quickly in the blood so that there

will be time to obtain a warrant, arrest the defendant and conduct a test before all the alcohol has dissipated.

It is obvious that in some cases tests concluded three or more hours after the driving have shown alcohol levels in the blood that exceeded the legislatively mandated level of intoxication. However, it cannot be certain that in all cases the alcohol level will be that high after three hours. Over the course of three hours the alcohol level will surely be reduced because, as pointed out in *Schmerber*, 384 U.S. at 770, the percentage of alcohol in the blood begins to diminish shortly after the drinking stops. In the case of the defendant, the police did not know when he had stopped drinking; it may have been a long time before he drove. The police only had probable cause to believe that the defendant was intoxicated when he drove. There was no way for the police to know that the defendant's level of intoxication would not go below the statutory level of intoxication if time was taken to obtain a warrant. Even if the percentage of alcohol did not go below the statutory level of intoxication, the percentage of alcohol in the blood would have diminished during the time the warrant was obtained and evidence would have therefore been destroyed. To prevent the destruction of evidence, the police were justified in entering the defendant's home to arrest him.

This Court has recognized the importance of early testing for intoxication:

> The Commonwealth must have the authority, if it is to protect people from drunken drivers, to require that the breath-analysis test record the alcoholic content of the bloodstream at the *earliest possible moment.*

Mackey, 443 U.S. at 15 (emphasis added).

Other courts have also concluded that, because the alcohol content in the blood diminishes after drinking

stops, the test for intoxication must be completed as soon as possible after the offense. *Brown v. Municipal Court of Los Angeles*, 86 Cal. App. 3d 357, 150 Cal. Rptr. 216, 220 (1978); *Williams*, 417 So. 2d at 756; *DeVaney*, 288 N.E.2d at 735; *State v. Spence*, 418 So. 2d 583, 586 (La. 1982); *Tefry*, 375 A.2d at 793; and *Martin*, 268 S.E.2d at 107-08.

Because it is necessary to test for the level of intoxication as soon as possible, there is not time for the police to obtain a warrant before entering the defendant's home to arrest him. The state has observed that few, if any, of the cases that allow the warrantless seizure of the blood samples even discuss the time it would take to obtain a warrant. In *Schmerber*, this Court said the officer could conclude that an emergency existed and the Court did not mention the time necessary to obtain the warrant. The courts have recognized that during the time it takes to get a warrant — however long that may be — evidence will be lost. Therefore, the courts have allowed the immediate seizure of the evidence. This rationale also permitted the police in the instant case to enter the defendant's home without a warrant in order to obtain evidence of intoxication before the evidence was lost.

The state submits that for the reasons discussed in this section of the brief, exigent circumstances existed to justify the warrantless entry into the defendant's home. The exigent circumstances coupled with the probable cause possessed by the police resulted in a constitutional arrest of the defendant in his home. For reasons discussed earlier in the brief, the arrest was valid whether this Court concludes that the defendant was arrested for a forfeiture offense of drunk driving or for a misdemeanor offense of drunk driving. In either case, drunk driving is a serious offense that could be classified as a crime, even a felony, within the guidelines of the eighth amendment.

V. This Court Should Not Require The Police To Seek A Telephone Warrant Before Entering The Defendant's Home To Arrest Him.

The defendant contends that before they could justify the warrantless entry of his home to arrest him, the police should be required to show that obtaining a telephone warrant would have been impracticable.

The state submits that the unavailability of a telephone warrant should not be made a requirement for justifying a warrantless entry. At the time of the arrest in the defendant's case, Wisconsin did not provide a procedure for obtaining such a warrant. In addition, at no time prior to filing his brief in this Court did defendant contend that the police should have sought a telephone warrant.

In any event, in the context of this case, the police should not be required to seek even a telephone warrant because during the time taken to obtain it evidence would have been lost. Not as much evidence may be lost in obtaining a telephone warrant as in obtaining a regular warrant, but some evidence nonetheless will be lost because the alcohol will continue to dissipate in the blood while time is taken to obtain the warrant.

Finally, the state is not aware of any case where this Court has ruled that the telephone warrant procedure is constitutional. The state submits that it would be premature for this Court to require the police in this case to have sought a telephone warrant when this Court has not ruled that the telephone warrant procedure is constitutional.

VI. A Decision Invalidating The Entry Into The Defendant's Home Would Hamper Effective Law Enforcement.

The defendant argues at the end of this brief that invalidating the entry into his home would not hamper effective law enforcement. The defendant urges this Court to adopt a "bright line" rule prohibiting the police, without a warrant, from entering a home to arrest a suspect whose only offense is minor.

Of course, the state contends that such a rule would not apply in the instant case anyway because drunk driving is more than a minor offense. However, if drunk driving were a minor offense, the defendant's rule would seriously hamper the enforcement of the drunk driving laws. The rule would permit the drunk driver to race home and avoid immediate arrest as long as he did not commit a serious offense, which the defendant would apparently define as a felony. Needed evidence of intoxication would be lost while the police sought a warrant. The defendant's rule does not even allow an entry without a warrant in those areas of the country that are sparsely populated and where obtaining a warrant can take a great deal of time. In addition, because the defendant does not want to permit a warrantless arrest in the case of minor offenses, he would apparently not allow the police to enter a home to stop a battery that in Wisconsin is a misdemeanor. *See* sec. 940.19(1), Wis. Stats. (1981). In other words, the defendant's rule would not permit the police to make a warrantless entry into a home to stop a crime of violence. This single example shows how impractical and dangerous the defendant's proposed rule is. The rule should be rejected and this Court should apply the normal rule that dispenses with the warrant requirement where the police possess probable cause and exigent circumstances exist. That exception was satisfied in the instant case.

CONCLUSION

For the reasons discussed above, the State of Wisconsin requests this Court to affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

STEPHEN W. KLEINMAIER
Assistant Attorney General of Wisconsin

Attorneys for Respondent.

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-1677